IN THE SUPREME COURT OF MISSOURI

PETITION IN MANDAMUS

SC86645

STATE ex rel. ELDON BUGG

v.

THE HONORABLE ELLEN S. ROPER

RESPONDENT

ON PETITION FROM THE CIRCUIT COURT OF BOONE COUNTY
Division III

Case No. 01CV165364

RELATOR'S BRIEF

Eldon Bugg
88 Pawnee Ln.
Boonville, MO 65233
660/882-9305
Relator

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JURISDICTIONAL STATEMENT

This case originated in a Boone County Circuit Court, Missouri, a petition in mandamus was summarily denied by the Western District Court of Appeals on the same issues now before this court, and the matter involves procedural rules promulgated by this court. Thus, jurisdiction is proper in this court based on its superintending authority granted by article V, section 4, of the Missouri Constitution.

SUMMARY OF THE CASE

Although the starting question is: whether an amended petition was interposed as a matter of course and if yes, whether defendants waived their venue challenge and stood in default for failing to plead in response thereto; the ultimate question is whether Missouri Circuit Courts have jurisdiction to determine venue before the matter-of-course amendment period has expired?

In the underlying action, relator – a resident of Boone County, Missouri – purchased a vehicle from defendants, at their residence in Jackson County which he then returned to Boone County. Thereafter, the vehicle broke down in Boone County, and relator filed suit in Boone County circuit court but neglected to properly allege jurisdiction and venue. On June 22, 2005, defendants were served in Jackson County with the original petition sounding in contract and tort.

Seven days after being served (June 29) Defendants filed a pre-answer motion to dismiss for lack of venue and noticed their motion to be heard by Respondent in Division III of Boone County Circuit Court. On July 6, seven days after defendants filed their motion to dismiss, relator amended the petition to allege venue, served on defendants his First Amended Petition and deposited a copy in the office of the Boone County Circuit Clerk.

On hearing (August 13, 2001), Respondent refused to acknowledge the First Amended Petition stating, instead: "there hasn't been leave to file any amended petition". Proceeding on the original petition, Respondent dismissed relator's claim without prejudice, August 17.

Relator filed his motion to vacate and suggestions arguing: 1) that relator's amended petition was timely filed as a matter of course pursuant to rule 55.33(a), 2) that because defendants failed to plead as prescribed by Rule 55.33(a) they now stood in default, and 3) that transfer rather than dismiss is an appropriate ministerial obligation. Relator then specifically prayed to vacate the dismissal order, and for entry of default judgment.

Respondent denied the motion and relator petitioned the Western District Court of Appeals in Mandamus which was also summarily denied. Thereafter relator petitioned Respondent for relief pursuant to Rule 74.06 asking that Respondent at least reinstate the matter and transfer to the proper venue.

Respondent again denied relief and relator sued out his petition in mandamus before this court.

STATEMENT OF FACTS

1. On June 22, 2001 defendants were served with a Petition and summons in which relator failed to properly allege jurisdiction and venue. (A. 1-8, Appendix, accompanying Relator's Brief).

2. Seven days later (June 29) defendants served a pre-answer motion to dismiss for improper venue and noticed their motion for hearing on August 13. (A. 9).

3. Seven days thereafter (July 6) relator served on defendants his First Amended Petition as a matter of course pursuant to Rule 55.33(a) and delivered a copy to the office of the Boone County Circuit Clerk pursuant to Rule 43.02. The amended petition set forth more fully allegations of jurisdiction, ve nue, and situs of injury. (A. 11).

4. Defendants filed no motion or pleading in response to the amended petition.

5. At the hearing on defendants motion to dismiss, (August 13) relator advised Respondent of the amended petition. Respondent refused to acknowledge and take jurisdiction over the First Amended Petition and, instead, conducted a hearing on the original petition. By statement to the court, Defendant acknowledged the existence of the amended petition. (A.18-21.1; colloquy between the court and the parties beginning at A 20, line 23:

> "MR. BUGG: There's been an amended petition.
>
> THE COURT: Well, there hasn't been leave to file any amended petition. We are here today on this Motion to Dismiss.
>
> MR. BUGG: As I read the rule, unless there's been an answer to the merits of the case, then the motion to - - the - - only a motion to dismiss, that doesn't require leave to file an amended petition.

THE COURT: You may be heard on the Motion to Dismiss.

Defendant later responded at A. 21.1 line 15:

> MR. LOCKE: Judge, I'm responding to the plaintiff's first amended – or first petition which was filed, not the first amended petition. He didn't have leave of the court to do that.

On August 17, Respondent issued an order sustaining Motion to Dismiss. (A. 22).

6. On August 29, relator timely filed his Motion to Vacate Order Entered without Jurisdiction and For Entry of Default Judgment informing Respondent of his right to file an amended petition pursuant to Rule 55.33(a) and asking the court to return the matter to the active docket and to enter default judgment against defendants for their failure to timely plead in response to the First Amended Petition. On October 12, Respondent denied the aforesaid motion. (A. 23-28).

7. Thereafter, relator petitioned the Western District Court of Appeals in Mandamus which was summarily denied without explanation on December 27, 2001. (A. 29-30). The petition and suggestions were essentially the same as here, except for discussion of *State ex rel Linthicum v. Calvin* 5 S.W. 3d. 855 (banc, 2001). (POINT II, § C, infra).

8. On April 22, 2002 relator timely filed in Boone County his Rule 74.06 motion for relief from the order of August 17, 2001 on the grounds of irregularity, and further prayed Respondent would modify her order of dismissal and would transfer the matter to the proper venue. On August 12, 2002 Respondent denied the motion and refused to transfer the matter to the proper venue. (A. 31-34).

POINTS RELIED ON

I

RELATOR IS ENTITLED TO AN ORDER DIRECTING RESPONDENT TO SET ASIDE ALL ORDERS SHE ENTERED BELOW, AND TO TAKE JURISDICTION OVER RELATOR'S FIRST AMENDED PETITION BECAUSE: A) RELATOR HAD AN UNEQUIVOCAL RIGHT TO AMEND WITHOUT LEAVE OF COURT, B) THE ORDERS WERE BASED ON AN ABANDONED PETITION, AND C) FOR PURPOSES OF DETERMINING VENUE, THE CASE WAS 'BROUGHT' WITH THE FIRST AMENDED PETITION; IN THAT RELATOR TIMELY LAID BEFORE THE COURT AND SERVED ON DEFENDANTS HIS FIRST AMENDED PETITION AS A MATTER OF COURSE PURSUANT TO SUPREME COURT RULE 55.33(a) AND SECTION 509.490 RSMo. OVER WHICH RESPONDENT WAS REQUIRED TO TAKE JURISDICTION AS A MATTER OF LAW.

Moss v. Home Depot 988 S.W.2d 627 (W.D. 1999)
Savings Finance Corporation v. Blair 280 S.W.2d 675 (S.D. 1955)
Domino sugar v. Sugar Workers Local 392 10 F.3d 1064, 1068 (4th Cir 1993)

II

RELATOR IS ENTITLED TO AN ORDER DIRECTING RESPONDENT TO SET ASIDE ALL ORDERS SHE ENTERED BELOW, TO TAKE JURISDICTION OVER RELATOR'S FIRST AMENDED PETITION, AND TO ENTER THEREON DEFAULT JUDGEMENT AGAINST DEFENDANTS BECAUSE DEFENDANTS WAIVED VENUE AND STOOD IN DEFAULT IN THAT: AFTER RELATOR TIMELY LAID BEFORE THE COURT AND SERVED ON DEFENDANTS HIS FIRST AMENDED PETITION AS A MATTER OF COURSE PURSUANT TO SUPREME COURT RULE 55.33(a) AND SECTION 509.490 RSMo., DEFENDANTS FAILED TO FILE THEIR REQUISITE RESPONSIVE PLEADING AND ASSERT THEIR OBJECTION TO VENUE THEREIN AFTER WHICH RELATOR TIMELY FILED HIS MOTION FOR DEFAULT JUDGMENT.

State ex rel Linthicum v. Calvin 5 S.W. 3d. 855 (banc, 2001)
State ex rel. Uptergrove v. Russell 871 S.W.2d 27 (W.D. 1993)
Supreme Court Rule 55.33(a)

III

IN THE EVENT THIS COURT FINDS THAT RELATOR IS NOT ENTITLED TO AN ORDER DIRECTING RESPONDENT TO SET ASIDE ALL ORDERS SHE ENTERED BELOW, TO TAKE JURISDICTION OVER RELATOR'S FIRST AMENDED

PETITION, AND ENTER DEFAULT JUDGMENT AGAINST DEFENDANTS; THEN RELATOR IS ENTITLED TO AN ORDER DIRECTING RESPONDENT TO TRANSFER THE MATTER TO THE PROPER VENUE BECAUSE §476.410 RSMo. EXPRESSLY MANDATES THAT WHERE VENUE IS IMPROPER THE COURT WILL TRANSFER THE CAUSE TO THE PROPER VENUE; IN THAT EVEN THOUGH DEFENDANTS WRONGFULLY FILED A MOTION TO DISMISS, RESPONDENT WAS STILL OBLIGATED TO FULFILL THE ADMINISTRATIVE FUNCTION OF TRANSFER.

State ex.rel. DePaul Health Center v. Honorable Thomas Mummert III 870 S.W.2d 820 (en banc, 1994)

State ex rel. Rothermich v. Gallagher 816 S.W.2d 194, 197 (banc, 1991)

§476.410, RSMo.

ARGUMENT

POINT I

RELATOR IS ENTITLED TO AN ORDER DIRECTING RESPONDENT TO SET ASIDE ALL ORDERS SHE ENTERED BELOW, AND TO TAKE JURISDICTION OVER RELATOR'S FIRST AMENDED PETITION BECAUSE: A) RELATOR HAD AN UNEQUIVOCAL RIGHT TO AMEND WITHOUT LEAVE OF COURT, B) THE ORDERS WERE BASED ON AN ABANDONED PETITION, AND C) FOR PURPOSES OF DETERMINING VENUE, THE CASE WAS 'BROUGHT' WITH THE FIRST AMENDED PETITION; IN THAT RELATOR TIMELY LAID BEFORE THE COURT AND SERVED ON DEFENDANTS HIS FIRST AMENDED PETITION AS A MATTER OF COURSE PURSUANT TO SUPREME COURT RULE 55.33(a) AND SECTION 509.490 RSMo. OVER WHICH RESPONDENT WAS REQUIRED TO TAKE JURISDICTION AS A MATTER OF LAW.

Moss v. Home Depot 988 S.W.2d 627 (W.D. 1999)
Savings Finance Corporation v. Blair 280 S.W.2d 675 (S.D. 1955)
Domino sugar v. Sugar Workers Local 392 10 F.3d 1064, 1068 (4th Cir 1993)
Supreme Court Rule 55.33

STANDARD OF REVIEW

A writ of mandamus will issue where a court has exceeded its jurisdiction or authority *State ex rel Schnucks Markets v. Koehr* 859 S.W.2d 696 (banc, 1993). The writ may lie both to compel a court to do that which it is obligated by law to do and to *undo* that which the court was by law prohibited from doing. *Id.* Mandamus will lie when there is a clear, unequivocal, and specific right. *State ex rel. Daniel L. Johnson, v. Honorable Stephen K. Griffin*, 945 S.W.2d 445 (banc 1997). Mandamus lies to require the performance of a ministerial act *DePaul Health Center v. Honorable Thomas Mummert III* 870 S.W.2d 820, 822 (en banc, 1994).

ARGUMENTATION

A

Relator had an unequivocal right to amend his petition as a matter of law.

As a threshold matter, the language of Rule 55.33(a) and §509.490 RSMo. is clear and unequivocal. 'A pleading may be amended once as a matter of course at any time before a responsive pleading is served'. As shown in statement of facts defendants did not file a responsive pleading. Instead, only 7 days after being served, defendants filed a motion to dismiss for improper venue. (A. 9).

A motion is not a responsive pleading:

a. Dictionary Distinguishes Motions from Pleadings.

Black's Law Dictionary defines a responsive pleading as:

> "[A] pleading which joins issues and replies to a prior pleading of an opponent in contrast to a dilatory plea or motion which seeks to dismiss on some ground other than the merits of the action". (emphasis added).

Black's Law Dictionary then defines a dilatory plea as:

> "[A] class of defenses at common law, founded on some matter of fact not connected with the merits of the case, but such as might exist without impeaching the right of action itself. They were either pleas to the *jurisdiction [or venue]*" (emphasis added).

Black's Law Dictionary defines a Motion to Dismiss as:

> "[O]ne which is generally interposed before trial to attack the action on the basis of insufficiency of the pleading, or process, venue, joinder, etc.".

The aforesaid dictionary definitions show a clear distinction between a motion and a responsive pleading.

b. Rules and Statutes Distinguishes Motions from Pleadings.

Missouri Rules of Civil Procedure, which are established by this court under its constitutional authority, distinguishes between pleadings and motions. Rule 55 *et. seq.* is

denominated “PLEADINGS AND MOTIONS”. Rule 55.01 is clear that there will be a pleading and an answer. There is no mention of a motion. Further, rule 55.01 through 55.25 all deal explicitly with pleadings as opposed to motions whereas Rule 55.26 explicitly pertains to the application of motions.

Implicit in the aforesaid rules is an unequivocal distinction between pleadings and motions. The ultimate distinction between pleadings and motions is found in rule 55.27 where a party has the option of either a responsive pleading or a motion. 55.27 further provides that “motions and pleadings may be filed simultaneously”. Implicit in rule 55.27 -- and indeed in the express language -- is that a motion is not a responsive pleading and a responsive pleading is not a motion. A party can file either, both, or none. Here, defendants opted for a motion.

Missouri statutes are also very clear on the distinction between a responsive pleading and a motion. §509.260.1 RSMo. fixes the time for filing a responsive pleading. The language of §509.260.3 is very explicit that while a motion may toll the time for filing a responsive pleading, it is not the responsive pleading and where the motion is denied, the responsive pleading is still required.

c. Case Law Distinguishes Motions from Pleadings.

Case law is also clear on the question of pleadings versus motions. See, for example *Moss v. Home Depot* 988 S.W.2d 627 (W.D. 1999) (Amended petition was properly filed without leave of court because motion to dismiss was not a responsive pleading within the meaning of rule 55.33(a)); *Savings Finance Corporation v. Blair* 280 S.W.2d 675 (S.D. 1955)(Dilatory motions are not responsive pleadings); *Domino*

sugar v. Sugar Workers Local 392 10 F.3d 1064, 1068 (4th Cir 1993) (Motion to dismiss is not a responsive pleading); *Bowden v. United States* 176 F.3d 552 (D.C. Cir. 1999) (alternative motions to dismiss and for summary judgment are not responsive pleadings); *Olson v. Auto Owners Insurance Company* 700 S.W.2d 882, 885 (E.D. 1985) (Since a motion is neither a petition, an answer, or a reply it is not a responsive pleading as defined in Rule 55.01). *Harris v. Nola* 537 S.W.2d 636 (W.D. 1976) (Rules considered separately or in combination, show plainly beyond question that motions are treated as separate and different from the pleadings).

Because both rule 55.33(a) and §509.490 RSMo. provide amendment as a matter of course, and because amendment is a procedural right that cannot be denied. (*Savings Finance*, 280 S.W.2d 675*),* Respondent had a corresponding and imperative duty to take jurisdiction over the First Amended Petition.

B

Respondent had no jurisdiction over abandoned petition.

Having the right to file an amended petition, relator abandoned the original petition. Once an amended petition is properly filed all of the previous petitions are abandoned unless incorporated by reference in the amended petition. *Danforth v. Danforth* 663 S.W.2d 288, 294 (W.D. 1983). Here, the original petition was not incorporated into the amended petition. (A. 11). When an amended petition is filed, a former petition becomes an abandoned pleading that receives no further consideration in the case *Trimble d/b/a A-Advanced Bail Bonds v. Timmi Pracna and Treveillian Heartfelt* 51 S.W.3d 481 (Mo App. 2001). An abandoned petition becomes a mere 'scrap of

paper' insofar as the case is concerned, and an [order to dismiss] cannot rest on an abandoned petition. Id.

In *Trimble,* a default judgment had already been entered when plaintiff filed her amended petition. The appellate court found with filing of the amended petition, that the default judgment was set aside as null and void because it rested on an abandoned pleading. The *Trimble* decision is instructive... when an amended petition is interposed, any prior court actions resting on prior -- abandoned -- petitions must be reconsidered (Id. at 490, 491).

Unlike *Trimble*, in the present case, no order had yet been entered when the amended petition was interposed. Surely if the law of abandoned pleadings nullifies a judgment previously entered, it would proscribe an order not yet entered. See also: *Welch v. Continental Placement Inc.,* 627 S.W.2d 319 (W.D. 1982) and citations therein. (emphasis added). (Where a petition has been replaced by an amended petition, the original petition has been abandoned and it may not be considered for **any purpose).**

Moreover, courts cannot rule on questions that are not properly presented for adjudication by the parties in the manner prescribed by law. *State ex rel Houser v. the Honorable Judge Goodman* 406 s.w.2d 121 (S.D. 1966). Therefore, the original petition being abandoned and not considered for any purpose, it was not before the court for adjudication on August 17.

Thus, Respondent acted in excess of her jurisdiction in ruling on a mere 'scrap of paper' (*Trimble*) which could not be considered for "any purpose" (*Welch),* and was not even before the court for adjudication (*Goodman*).

C

Case was 'brought' when petition was amended as a matter of course.

In Missouri venue is determined when the case is **"**brought": *DePaul,* @ 823. There being an unequivocal right to amend as a matter of course, the question arises as to when is a case 'brought' that involves a matter-of-course amendment? The latest analysis in the leading authorities have focused on the term 'brought' as set forth in §508.010.

This court analyzed when a case is 'brought' in *State ex rel Linthicum v. Calvin* 5 S.W. 3d. 855 (banc, 2001) which also involved an amended petition. Although the amended petition in *Linthicum* added defendants which went directly to the question of venue, it must first be kept in mind that here, the real issue is lack of procedural conformity in that defendant failed to plead to the amended petition thereby waiving venue, and Respondent failed to either take jurisdiction over the amended petition or transfer venue. Nonetheless, relator respectfully submits that certain principles set forth in *Linthicum* provides some instruction for the instant case which asks the question whether a case is technically 'brought' before the period for amending as a 'matter-of-course' expires?

First, relator concedes that venue is prescribed by statute[1]. Although venue is not the issue here, relator quickly points out that the instant case contains counts in tort with

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[1] *State ex.rel. DePaul Health Center v. Honorable Thomas Mummert III* 870 S.W.2d 820, 822 (en banc, 1994).

both parties being Missouri residents. The statute controlling venue involving torts is §508.010(6) RSMo. which states in part: “In all tort actions the suit may be brought in the county where the cause of action accrued regardless of the residence of the parties”. Regardless of the residence of the parties, the underlying suit on which this petition in mandamus is based, involved transitory personal property which broke down in Boone County, was repaired in Boone County, and all repair witnesses reside in Boone County. Thus, although venue is not the question here, (and defendants waived venue anyway, infra) the amended petition does plead that the injury occurred in Boone County invoking §508.010(6).

Relator also concedes that in Missouri venue is determined when the case is **“**brought”: *DePaul*, @ 823. However, in *Linthicum*, 5 S.W. 3d. 855 (banc, 2001), this court further developed venue law by defining when a case is “brought” in light of an amended petition. Consulting the AMERICAN HERITAGE DICTIONARY 209 (2d Collegiate ed. 1991) the court first found the word "brought" in the legal context means "to advance or set forth in a court." Id. @ 858. The court then applied that definition to the facts of *Linthicum* and ultimately to Missouri’s general venue statutes in Chapter 508.

In *Linthicum* a Missouri resident sued an Arkansas defendant in St. Louis City to establish venue in that court then sought leave to amend the petition bringing Missouri defendants into the City venue. This court essentially held that although venue was determined when the original petition was “brought” against the Arkansas defendants, that venue had to also be determined as the case was “brought” by the amended petition. Venue in the amended petition trumped venue in the original petition. The majority

opinion reasoned that subsections of §508.010 are not limited to initial petitions.

What light does the *Linthicum* analysis shed on the instant case, simply this: In *Linthicum* this court found that "the word 'brought' is subject to a number of specific subdivisions [of §508.010] all describing the various situations that might arise regarding the *residency* of all defendants included in the lawsuit". Id. @ 858. The rationale being that adding defendants might invoke a different subdivision of the statute as to all defendants and the initial subdivision might no longer apply to determine venue. Relator respectfully submits that the same analysis must apply anytime that a petition is amended as a 'matter of course' because the matter-of-course amendment might change the subdivision of §508.010 controlling when the amendment is 'brought'.

In the normal procedural process of bringing an action, it must be observed that the first provision in Rule 55.33(a) and §509-490 is that a petition may be amended as a 'matter of course'. The aforesaid authorities establish a 'matter of course' period which runs until a responsive pleading is filed. There is no language in either authority limiting the scope of amendments. A matter-of-course amendment could add defendants or allegations at the option of the pleader – either or both of which could invoke a different subdivision of §508.010. As such, venue can only be determined as the case "stands" and is "brought" after the 'matter-of-course' amendment. Therefore, it must be said, that <u>the court's jurisdiction to determine venue cannot obtain until the time for amendment as a matter of course has expired</u>. In the instant case, the 'matter of course' amendment set forth new allegations defining the situs of tortious injury which bore directly on venue. (A. 11-16).

Relator found no case involving a venue challenge followed by a matter-of-course amendment. Relator respectfully submits that as a matter of first impression, since the rules allow petitions to be amended as a matter of course, a determination of venue cannot be made until the matter-of-course period expires. The court cannot know the scope of the case until either a matter-of-course amendment has been filed or the matter-of-course period expires. Said differently, until a matter-of-course amendment is 'brought', or a 'responsive pleading' forecloses the possibility of any matter-of-course amendment, the venue question is in a state of flux. Here, the matter-of-course period had not expired even on August 17 when Respondent made her determination and wrongfully dismissed for lack of venue.

In sum, the *Linthicum* analysis comports with the venue rules and statutes (55.33(a) and §508.010), the amendment rules and statutes (55.33(a) and §509-490), and the common law of abandoned petitions (*Danforth*, *Trimble*, *Welch*, Supra). That is, where the law determines venue when a case is "brought", and where the law provides for amending and abandoning the original petition as a matter of course, then it follows logically that venue must be determined after the amended petition is "brought". If the original petition is abandoned, then also "how the case stood" is abandoned.

Therefore, the analysis of *Linthicum* should apply here. Although the instant amended petition did not "advance or set forth" new defendants it did "advance or set forth" new allegations of injury in Boone County all bearing on venue: namely, "where the cause of action accrued" as stated in §508.010(6). 'Advancing or setting forth' new allegations relative to where the cause of action accrued are as vital to the determination

of venue as 'advancing or setting forth' a new defendant.

Thus, in light of the aforesaid legal reasoning, Respondent had a clear, unequivocal, and specific right to file his amended petition, and Respondent had a corresponding and imperative duty to take jurisdiction over the amended petition before determining venue.

POINT II

RELATOR IS ENTITLED TO AN ORDER DIRECTING RESPONDENT TO SET ASIDE ALL ORDERS SHE ENTERED BELOW, AND TO TAKE JURISDICTION OVER RELATOR'S FIRST AMENDED PETITION, AND TO ENTER THEREON DEFAULT JUDGEMENT AGAINST DEFENDANTS BECAUSE DEFENDANTS WAIVED VENUE AND STOOD IN DEFAULT IN THAT: AFTER RELATOR TIMELY LAID BEFORE THE COURT AND SERVED ON DEFENDANTS HIS FIRST AMENDED PETITION AS A MATTER OF COURSE PURSUANT TO SUPREME COURT RULE 55.33(a) AND SECTION 509.490 RSMo., DEFENDANTS FAILED TO FILE THEIR REQUISITE RESPONSIVE PLEADING AND ASSERT THEIR OBJECTION TO VENUE THEREIN AFTER WHICH RELATOR TIMELY FILED HIS MOTION FOR DEFAULT JUDGMENT.

State ex rel Linthicum v. Calvin 5 S.W. 3d. 855 (banc, 2001)

State ex rel. Uptergrove v. Russell 871 S.W.2d 27 (W.D. 1993)

Supreme Court Rule 55.33

STANDARD OF REVIEW

Relator incorporates the standard of review set forth in point I.

ARGUMENTATION

Rule 55.27 is clear and unequivocal that every defense in law or fact shall be set forth in a 'responsive pleading' except that certain defenses may be asserted by motion. However,

the language of Rule 55.33(a) and §509.490 RSMo. is also clear and unequivocal that: "A party *shall plead* in response to an amended pleading within the time remaining for

response to the original pleading or within ten days after service of the amended pleading whichever period may be the longer unless the court otherwise orders". (emphasis, Relator's). The language of 55.33(a) and §509.490 makes no provision for filing a dilatory motion to a matter-of-course amendment. Plus, neither is a motion a responsive pleading, supra.

Defendants were served with summons on June 22. (A. 1). Response to the original pleading was due on July 21 and the court made no order otherwise. Relator delivered his amended petition to the Office of the Boone County Circuit Clerk on July 6. (A. 11). Although Defendants had several days remaining for response to the original pleading, they

did not respond at all. In fact, defendants' counsel, Mr. Locke, stated that he was responding to the first petition and not the amended petition. (A. 21.1).

To conform to the rules, (and prudent practice) defendants would have filed a responsive pleading and raised therein any challenge to venue based on the amended petition rather than relying on their motion to dismiss directed to the original petition. In addition to a responsive pleading pursuant to Rule 55.33(a), prudent practice would have also suggested a motion to transfer pursuant to Rule 51.045.

When a party fails to properly raise their objection to venue, the same is waived. *State ex rel. Uptergrove v. Russell* 871 S.W.2d 27 (W.D. 1993). The language of Rule 51.045 (Adopted May 26, 2000, eff. Jan. 1, 2001) is also unequivocal that failing to timely file a motion to transfer waives venue.

Having been served with an amended petition as a matter of course pursuant to

Rule Rule 55.33(a), defendants' objection to venue in their motion to dismiss the original petition was not valid as to the amended petition. Instead, the rules imply that defendants must again raise the objection to venue in the requisite responsive pleading of Rule 55.33(a). In fact, due to the legislative intent of §476.410 (and Rule 51.045) defendants' motion to dismiss was not well taken as to either the original or amended petitions.

In his motion to vacate, relator asked Respondent to enter default judgment against defendants on the basis that defendants' failed to *plead* to the First Amended Petition and assert their objection to venue therein. (A. 23). Because jurisdiction obtained in Boone County when defendants failed to *plead* in response to the First Amended Petition, Respondent should have entered default judgment against defendants.

POINT III

IN THE EVENT THIS COURT FINDS THAT RELATOR IS NOT ENTITLED TO AN ORDER DIRECTING RESPONDENT TO SET ASIDE ALL ORDERS SHE ENTERED BELOW TO TAKE JURISDICTION OVER RELATOR'S FIRST AMENDED PETITION, AND ENTER DEFAULT JUDGMENT AGAINST DEFENDANTS; THEN RELATOR IS ENTITLED TO AN ORDER DIRECTING RESPONDENT TO REINSTATE THE MATTER AND TRANSFER IT TO THE PROPER VENUE BECAUSE §476.410 RSMo. EXPRESSLY MANDATES THAT WHERE VENUE IS IMPROPER THE COURT WILL TRANSFER THE CAUSE TO THE PROPER VENUE; IN THAT: EVEN THOUGH DEFENDANTS WRONGFULLY FILED A MOTION TO DISMISS, RESPONDENT WAS STILL OBLIGATED TO FULFILL THE ADMINISTRATIVE FUNCTION OF TRANSFER.

State ex.rel. DePaul Health Center v. Honorable Thomas Mummert III 870 S.W.2d 820 (en banc, 1994)
State ex rel. Rothermich v. Gallagher 816 S.W.2d 194, 197 (banc, 1991)
§ 476.410, RSMo.

STANDARD OF REVIEW

Relator incorporates the standard of review set forth in point I. Also, a petition for

writ of mandamus is an appropriate remedy to reinstate a petition erroneously dismissed for improper venue. *State ex rel. Rothermich v. Gallagher* 816 S.W.2d 194, 197 (banc, 1991).

ARGUMENTATION

Prior to the enactment of § 476.410, RSMo., dismissal of an action was required upon the determination by the trial court that venue was improper. *Rothermich* 816 S.W.2d 194, 197. Now, however, §476.410 RSMo mandates that where venue is improper the court will transfer the cause to the proper venue. That statutory obligation to transfer is now well settled law in Missouri. See *Mogley v. Flemming* 11 S.W.3d 740 (E.D. 2000) (Court must transfer). *Abney v. Niswonger* 823 S.W.2d 31 (E.D. 1993)(Circuit Court should have transferred rather than dismiss).

This court has labeled the obligation to transfer as a ministerial duty of the court. *State ex.rel. DePaul Health Center v. Honorable Thomas Mummert III* 870 S.W.2d 820 (en banc, 1994). It should be done voluntarily, but is also enforceable by Writ of Mandamus.

Id.

Thus, even assuming, arguendo, that respondent acted within her authority and found that venue was improper based on the original petition, she should have transferred the matter to the proper venue.

CONCLUSION

For the aforesaid reasons, this court's Alternative Writ of Mandamus should be made absolute and Respondent should be directed to 1) vacate her orders of August 17,

2001, October 12, 2001, and August 12, 2002, 2) to take jurisdiction over the First Amended Petition, and 3) to enter default judgment against defendants; or 4) in the alternative to transfer the matter to the proper venue.

Respectfully submitted,

Eldon Bugg
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660/882-9305

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Appellant's Brief complies with the limitations contained in

Rule 84.06(b) and that the word count, exclusive of the certificates, and signature block, is

5247.

Eldon Bugg
88 Pawnee Ln.
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CERTIFICATE OF ANTIVIRUS

The undersigned certifies that the diskette filed with this brief pursuant to rule 84.06(g) has been scanned for viruses and is virus free.

Eldon Bugg
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CERTIFICATE OF SERVICE

On this _____ day of _____, 2005 relator served a copy of the foregoing

brief on The Honorable Ellen S. Roper, and Mr. Robert D. Kingsland by placing a copy in

the mail, first class, postage prepaid and addressed to the last address of record for each

named recipient.

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